

1 sitting here today. And the procedures - and  
2 I've had this happen - I've had this happen  
3 with expert testimony recently, same deal  
4 we're talking about here. It's an exchange.  
5 Everybody gives their sworn written, and the  
6 witness gets up there, and it's right in his  
7 written testimony. And he's been cross-  
8 examined, he's been deposed, and he's going to  
9 be cross-examined, and the defendant,  
10 respondent in that case, gets to put his  
11 expert on. And the first question he is asked  
12 is, do you agree with what Dr. So-and-so said?  
13 And he says, no. And he gives reasons why  
14 not.

15 Now that has got to have  
16 limitations to it. He is not going to go down  
17 and parse it all. But this helps me, because  
18 if this person is testifying to Alice in  
19 Wonderland, and he does a beautiful job with  
20 it, but then the other expert gets up and  
21 says, well, this isn't an Alice in Wonderland  
22 case, I'd like to know that if it's coming

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1 from an expert.

2 MR. COHEN: Your Honor, we have  
3 sequenced the experts. And identified the  
4 fact witness. And I think we are fine with  
5 Mr. Frederick's formulation, which is where we  
6 started. As long as Your Honor understands or  
7 agrees that what - that we will have a right  
8 to where appropriate and where surprised to  
9 put in some responsive testimony that is not  
10 within the four corners of our written  
11 defendants' directs, then we are okay with  
12 that.

13 JUDGE SIPPEL: You put it on in  
14 rebuttal. You are talking about rebuttal?

15 MR. COHEN: No, I am not talking  
16 about rebuttal. I am talking about they are  
17 the plaintiff and they go first. The schedule  
18 has a crossing of the written direct, but does  
19 not have a crossing of the testimony at trial.  
20 And if a Wealth TV witness gets up and says  
21 something that we had not anticipated - after  
22 all, there were declarations but they are not

1 bound by them. So if Wealth TV -

2 JUDGE SIPPEL: But you also have  
3 depositions and discovery.

4 MR. COHEN: No, Your Honor, we  
5 are foregoing fact depositions in our case.  
6 We are trying to accommodate the expedition  
7 without giving up our rights. This is not  
8 solely a due process argument. It's an  
9 evidentiary argument. The Commission's rules  
10 provide for a burden of proof, and they have  
11 the burden of proof.

12 MR. MILLS: Let me just add,  
13 there is also going to be new discovery,  
14 limited but some discovery and experts. And  
15 I don't know that the Wealth TV's declarations  
16 on the prefiled testimony, I don't know that  
17 it is going to be limited to just what was in  
18 the complaint and in the reply. There may be  
19 new facts, and I will not have a chance to  
20 respond to that with my witnesses as I'm  
21 normally permitted to do at a trial, because  
22 I am going to be filing my prefiled testimony

1 at the same time. So when my witness finally  
2 gets to testify after we had exchanged  
3 simultaneously direct testimony, and the  
4 Wealth TV witness goes on and testifies, my  
5 witness for the first time gets to address  
6 anything, if permitted, that was said for the  
7 first time in any of the prefiled testimony of  
8 the Wealth witnesses. I have to have the  
9 ability to do that and not just be limited to  
10 cross-examining their witnesses on those  
11 points.

12 JUDGE SIPPEL: Well, my point is,  
13 and I hear you, I hear you. All that sounds -  
14 it's a hornbook law or a hornbook analysis,  
15 and it's good. I don't mean to negate it.  
16 What I'm saying is that if a witness, if he  
17 comes in and he gives sworn written testimony,  
18 and basically he is going to swear that that  
19 is it, Your Honor, the truth, the whole truth,  
20 and nothing but the truth, so help me God,  
21 whoever, okay. And then he goes into his  
22 testimony, and you are cross-examining him on

1       that, and you say, well, you are trying to say  
2       this but it's not in here, why? You know,  
3       which is true, what you are trying to say  
4       today or what's in here? That's going to  
5       affect his credibility.

6               MR. MILLS:     Your Honor, let me  
7       try to differ with a simple example. Let's  
8       assume that a Wealth witness comes forward and  
9       says for the first time I had a conversation  
10      with somebody - in their prefiled direct - in  
11      Time-Warner cable, one of our witnesses that  
12      we had never heard about before. It's not in  
13      their complaint; it's not in their  
14      declaration. We have on the same day  
15      submitted a declaration from that person, to  
16      make the hypothetical easy. But we have not  
17      heard that before. He's not responding, or  
18      she is not responding, to that allegation,  
19      because that allegation has never been made  
20      before.

21               What we are saying is that when  
22      the Time-Warner or Comcast or Cox witness gets

1 up at trial, they will testify in addition to  
2 what was in their written prefiled direct and  
3 say, by the way, I learned last week on April  
4 6<sup>th</sup> or whenever the exchange date is that the  
5 Wealth witness said this, that conversation  
6 did happen, it didn't happen. I remember it  
7 a different way. I agree, but there has to be  
8 some ability to respond to new evidentiary  
9 material that we are hearing on the day of  
10 simultaneous transmission.

11 MR. FREDERICK: Your Honor, for  
12 MASN, and this is with Comcast, it's not with  
13 Time-Warner, in the event that you want to  
14 reserve hypotheticals like that, we have no  
15 problem at all addressing that in a reasonable  
16 fashion at the trial.

17 MR. MILLS: Well, for Cox, and we  
18 are not in the case with MASN, but the Wealth  
19 case, the question that this not just be  
20 hypothetical that we have a burden that we  
21 have to establish that. Because it's not  
22 unlikely that there will be new facts in the

1 prefiled testimony from Wealth TV. I don't  
2 know whether there will be, but there will be  
3 discovery, new evidence in discovery. They  
4 want discovery. They have asked us for  
5 documents. They may have their witnesses put  
6 something in prefiled testimony about that  
7 that we don't know what they are going to say.

8 JUDGE SIPPEL: But you are doing  
9 to see that?

10 MR. MILLS: That's right.

11 JUDGE SIPPEL: On exchange day,  
12 you get to see that.

13 MR. MILLS: I don't get a chance  
14 to file anything in response. When does my  
15 witness respond to that? If my witness is  
16 limited in his or her testimony to only what  
17 that witness filed at the simultaneous moment  
18 that I first heard about this other  
19 information, then my witness never gets a  
20 chance to respond. This is just a logical  
21 sequencing.

22 JUDGE SIPPEL: You mean because

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1 you are already locked into your sworn  
2 witness? No problem with that.

3 MR. MILLS: Thank you.

4 JUDGE SIPPEL: What I want to  
5 make clear, however, is that I was in a  
6 district court litigation, and I would do the  
7 same thing. If you came up with such a  
8 surprise, and it was such critical evidence or  
9 testimony whatever it was, he said, you've got  
10 a team of lawyers there, you go out and you  
11 depose this person, you take his deposition  
12 right here and now, and we are going to keep  
13 the trial going. And it worked. It got the  
14 thing nailed down the way it was supposed to  
15 get nailed down.

16 So there are all kinds of remedies  
17 to it, if that is going to happen. I'm not  
18 going to expect it to happen. Because I said  
19 it affects the credibility of the witness. It  
20 affects the credibility of any witness that  
21 puts a written statement in and then he has to  
22 waltz around it. These cases, you know, you



1 know what they do. Credibility is the whole  
2 game.

3 MR. BECKNER: Well, I think, Your  
4 Honor, we are not talking about walking  
5 around. We are talking about filling in an  
6 omission. In other words if there is a  
7 declaration where Mr. Herring, the principal  
8 of Wealth TV, says, I had lunch with Steve  
9 Miron of Bright House, on April 10<sup>th</sup>, and we  
10 talked about this and that and the other. He  
11 says that in his prefiled testimony. Steve  
12 Miron's prefiled testimony says nothing about  
13 that at all. When he comes up, when he comes  
14 up to testify orally in the hearing, Steve  
15 Miron should be able to say, actually, we  
16 didn't have lunch, or we had lunch but we said  
17 this, this and this.

18 JUDGE SIPPEL: All right. I  
19 agree with everything you are saying. What  
20 I'm saying is, my point is that if you file a  
21 written statement on day - 10 days before the  
22 hearing you file a written statement, this is

1 the testimony of this witness. And you are  
2 talking to the witness, prepping him, and he  
3 says, by the way I had this - I had this very  
4 critical luncheon date with so-and-so that I  
5 forgot to tell you about, there is an  
6 obligation to amend that written statement  
7 right then and there. You can't walk into the  
8 courtroom and say, oh by the way, Your Honor,  
9 what we filed last week really is not  
10 altogether true when you know about it before  
11 coming into the courtroom.

12 MR. COHEN: That is the sequence  
13 argument. That is Your Honor that we should  
14 follow our written direct testimony a week  
15 after the plaintiffs, not delaying any days  
16 worth of trial days. But I don't understand  
17 how the amendment doesn't address that issue.

18 There are only two ways to do it.  
19 I don't know what's critical and what's not  
20 critical. But in that circumstance, witness  
21 number two, Mr. Miron, had no way of  
22 anticipating that that was - what you are now

1 saying is that we then - we the defendants  
2 with respect to each witness have to amend  
3 then I mean -

4 JUDGE SIPPEL: If the testimony  
5 is going to change from what's in the written,  
6 and you know about it before the witness goes  
7 the stand, there is an obligation to let the  
8 other side know that that is -

9 MR. FREDERICK: Your Honor, we  
10 have very much of an interest in being able to  
11 cross-examine their last minute changes to  
12 their testimony, and if you permit any kind  
13 of amended declaration, it ought to be done by  
14 both sides in advance of the trial to that  
15 both sides have a fair opportunity to cross-  
16 examine those changes.

17 JUDGE SIPPEL: All right, well  
18 let me reserve on that. I'm just going to  
19 take this on an ad hoc basis.

20 MR. BECKNER: Or we could do it  
21 the old fashion way and just have oral direct  
22 testimony.

1 MR. MILLS: Well, the other  
2 solution, Your Honor, is simple, it doesn't  
3 change any of the dates except on the 6<sup>th</sup> of  
4 April, if you look at the Time-Warner  
5 submission for the Wealth TV defendants, if  
6 you look at that page, the second page of the  
7 proposal, on April 6<sup>th</sup>, 2009, you can see that  
8 the hearing exhibits are exchanged, and were  
9 utilized written testimony by 12:00 noon. And  
10 you'd be changing that to written testimony,  
11 not just where utilized, but written direct  
12 testimony for the complainant.

13 And then on April 13<sup>th</sup>, one week  
14 later, you would have written submissions by  
15 the defendants. And in that case, that would  
16 allow us then to respond with our testimony,  
17 our written testimony, to the witnesses that  
18 the complainants with the burden of proof are  
19 putting forward.

20 It wouldn't change any of the  
21 other dates.

22 MS. WALLMAN: Your Honor, it

1 would change my life, because it gives me a  
2 week less to work with those declarations, and  
3 I've got four cases to prepare.

4 MR. HARDING: Yours is still due  
5 on the same date.

6 MS. WALLMAN: Yes, but I need to  
7 be able to react to what you've got. And you  
8 give me a week less.

9 JUDGE SIPPEL: You mean you'd get  
10 it on the 13<sup>th</sup> instead of the 6<sup>th</sup>?

11 MS. WALLMAN: Right.

12 MR. FREDERICK: It also violates  
13 the principle that he who has the burden of  
14 proof gets the last word. And if they are  
15 going to change their written after having  
16 already put in declarations in this case,  
17 because they took the extra time to vet every  
18 word and every comma of the affirmative  
19 declarations, by all rights, we get the last  
20 word in terms of correcting and amending or  
21 supplementing any written testimony that we  
22 would provide.

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1           The simplest thing, Your Honor, is  
2 simply to take this on an ad hoc; have  
3 simultaneous exchanges of the written  
4 declarations. Allow the parties during the  
5 hearing to cross examine and to buttress or  
6 supplement, oral form, but not to allow so  
7 much extra written process that we get bogged  
8 down and we don't keep to the trial schedule.

9           MR. MILLS: We are fine. That  
10 sounds a lot like a due process argument.  
11 That is fine if we are not going to have  
12 sequenced submissions as long as our witnesses  
13 can address the material in the direct  
14 testimony of the complainant.

15           JUDGE SIPPEL: All right, I  
16 withdraw what I was saying about sequence.  
17 Well, I was talking about amendments. There  
18 is not going to be any amendments, once your  
19 written comes in, that's it. And you are  
20 going to run the risk of credibility with your  
21 witnesses if he has to come in and explain.  
22 He's got an obligation, he's going to be on

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1 the stand, he's got an obligation to say  
2 what's true and what's not true. So we'll  
3 leave it the way it is, and just disregard  
4 whatever - try to stay with this, but we are  
5 fine. We are fine. So far so good.

6 Now I don't think - does anyone  
7 else have anything else?

8 MS. WALLMAN: Yes, Your Honor, I  
9 have one more issue to raise.

10 JUDGE SIPPEL: Ma'am?

11 MS. WALLMAN: Before the  
12 Commission entered its order on the 27<sup>th</sup> of  
13 January, the parties were within 24 hours of  
14 making a submission to the Media Bureau in  
15 response to an order that asked in Wealth TV's  
16 view several useful questions and requiring  
17 the parties to present their best and final  
18 offer.

19 And I asked the Court to consider  
20 whether it would be useful to have those  
21 submissions go forward as part of the record  
22 here. Wealth TV would be prepared to do that.

1                   MR. COHEN:     Your Honor, that is  
2                   totally unacceptable to us for all sorts of  
3                   reasons.     But let me start with the most  
4                   practical one.   It was a rescinded order.   It  
5                   was a procedure that didn't make any sense.  
6                   And we were shooting blind.   We were going to  
7                   be required to put in a best and final offer  
8                   without having any idea whatsoever about the  
9                   terms of carriage that Wealth has offered to  
10                  anyone else.

11                 So we have a process.   Remedy is  
12                 part of the process; we'll try the case.   But  
13                 that would have been a meaningless offer on  
14                 our part.   If we were required to do it we  
15                 would have done it, and we would have had to  
16                 abide by it.   But frankly we were blindfolded  
17                 going into the process, and we shouldn't  
18                 repeat all those mistakes.   That's one of the  
19                 reasons I assume why the Commission vacated  
20                 the order.

21                 So I can't see any purpose in that  
22                 whatsoever.



1                   MR. FREDERICK: Well, Your Honor,  
2                   the Adelphia order for Time-Warner and Comcast  
3                   requires best offer arbitration. Time-Warner  
4                   can't say it didn't have notice, because it  
5                   did a best offer arbitration with MASN last  
6                   year, in which without knowing what MASN's  
7                   offer was, it had to submit a best offer.  
8                   And that process allowed the adjudicator to  
9                   make a binary choice between one side's  
10                  reasonable offer and the other side's  
11                  reasonable offer.

12                 So I don't think it's really fair  
13                 - I can't speak for Cox or Bright House, but  
14                 certainly Comcast and Time-Warner have been on  
15                 notice for 2-1/2 years that the Commission  
16                 thinks that best offer arbitration and that  
17                 kind of process is a fair way to provide a  
18                 remedy in a carriage discrimination complaint.  
19                 And Time-Warner has already arbitrated one of  
20                 those kinds of cases.

21                 So to the extent that you think  
22                 that that will help frame your ability to

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1 shape a remedy in the event of a finding of  
2 liability for discrimination, we certainly  
3 have no objection, and we would concur with  
4 Wealth TV that that provides a useful frame of  
5 reference for understanding the reasonableness  
6 of the remedy, Your Honor.

7 MR. SOLOMON: Your Honor, this is  
8 a vacated Media Bureau order that was setting  
9 up a process that wasn't what is in the HDO.  
10 You set forward a schedule that we have all  
11 agreed to. We have all agreed to schedules  
12 that you have now adopted, that set forth  
13 discovery, set forth a rational way to present  
14 evidence.

15 It's just not at all clear to me  
16 why we should be going back to a repudiated  
17 process that the Media Bureau set up,  
18 particularly as Mr. Cohen said, that was all  
19 premised on the fact that there was no need  
20 for discovery, which you and Judge Steinberg  
21 both disagreed with.

22 MR. MILLS: I would add that the

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1 HDO originally suggested that if the parties  
2 wanted to engage in mediation or alternative  
3 dispute resolution they are welcome to do so.  
4 We and I believe the other defendants have  
5 indicated a willingness to do that. Wealth TV  
6 did not. That was what the Bureau - that's  
7 what the Commission suggested in that order.  
8 We are beyond that.

9 If there is some suggestion that  
10 there be some further discussions, we are  
11 happy to engage in that. But this is not a  
12 baseball style arbitration. It is not a  
13 binding arbitration. Procedure is set up  
14 quite clearly. And we are moving backwards.

15 And also to respond to Mr.  
16 Frederick, not only did the Adelpia order not  
17 govern this proceeding, it was vacated by the  
18 Commission. There will be no further baseball  
19 arbitrations under the Adelpia order of the  
20 type that Mr. Frederick was talking about.

21 Why would we reinvent that here?  
22 And it doesn't make any sense to me

1       whatsoever.

2                   MR. FREDERICK:   My only point is  
3       that   it   frames   an   analysis   and   an  
4       understanding of what constitutes the parties  
5       views of a reasonable carriage.   And to the  
6       extent that you regard it as informative of  
7       what each side is expecting out of this  
8       process, it's got a use to you.   Even if you  
9       are not bound to make a binary choice, there  
10      is still an element of education and  
11      information about the remedy process that can  
12      obviate a lot of unnecessary time during the  
13      hearing.

14                   JUDGE SIPPEL:   Well, as I look at  
15      it, if I'm flying a plane, it looks to me like  
16      I'm flying into a bunch of ducks if I do that.  
17      I don't know what I'm getting into.   I have no  
18      idea what you are talking about as far as what  
19      it's going to mean to me.   I just have a  
20      concept of what you are talking about, don't  
21      get me wrong.   But we are not there yet.   I am  
22      trying to figure out about cross-examination

1 and discovery. But it does raise a question,  
2 it raises two questions. Let's get to this  
3 one first. If the hearing is - and the first  
4 decision, the recommended decision is on  
5 liability only, then the question of the  
6 remedy could be - no? No good?

7 MR. FREDERICK: Well, your  
8 recommended order, if it goes to the  
9 Commission, is going to have to do with  
10 liability and remedy. And all I'm trying to  
11 do is to provide a process so that you can  
12 facilitate an expeditious consideration of  
13 remedy.

14 JUDGE SIPPEL: Well, anybody that  
15 wants - I mean if you all want to agree to  
16 some kind of a - or cite me to an authority or  
17 something for purposes of my education, I'd  
18 welcome that. Because I've never handled a  
19 remedy of a carriage case before; I'll be very  
20 frank about it. But I think that by the  
21 finish here I'll be able to.

22 MR. MILLS: I assume this is what

1 is going to be the subject of some of the  
2 prefiled testimony.

3 JUDGE SIPPEL: All right, fine.  
4 That's the way it should be. That's what a  
5 trial is all about. I appreciate what you are  
6 saying. I appreciate all the help I can get.  
7 But let's not move into that yet at all.  
8 Whatever the testimony is, that's what I'm  
9 going to hear. Whatever the documents are,  
10 that's what I'm going to read. And whatever  
11 the parties give to me in terms of proposed  
12 findings and proposed IDs, that's what I'm  
13 going to use.

14 Now last question, what about  
15 these - NFL seems to be relying on some kind  
16 of findings made in the HDO. What kind of  
17 findings are you talking about?

18 MR. LEVY: Your Honor, if you  
19 look at the hearing designation order, it's  
20 broken essentially into sections. The  
21 sections, and bear with me for just a second.  
22 The section that deals with NFL Enterprises-

1 Comcast dispute begins on page 28 of the  
2 order. It's initially discussion of  
3 background.

4 JUDGE SIPPEL: Twenty eight of  
5 the order.

6 MR. LEVY: It begins on page 28.  
7 There is initial discussion of background that  
8 goes through page 32, then it deals with  
9 procedural issues including the statue of  
10 limitations on page 33, the interaction of the  
11 private agreement between the NFL and Comcast  
12 and the claims at issue here, pages 34 and 35,  
13 and other issues on pages 36.

14 And then it goes on to the  
15 discrimination claim and the Section 616  
16 claim.

17 The first point I'd make is that  
18 the threshold issues, the statute of  
19 limitations issues and the like, those have  
20 all been resolved. The only delegation to the  
21 ALJ by the hearing designation order, which  
22 remains in place, deals with the

1 discrimination claim, and that's on page 41 in  
2 paragraph 85.

3 And then the section 616 claim,  
4 and that appears on page 43, paragraph 89.

5 My first point is that there is no  
6 reason for Your Honor to go back through those  
7 threshold issues. There is no need for any  
8 evidence on those threshold issues. Because  
9 they have been resolved as far as the Media  
10 Bureau was concerned, and they are outside the  
11 scope of what the delegation of the ALJ has  
12 been.

13 The second point is that even  
14 within the discussion of the discrimination  
15 claim and the Section 626 claim, the Bureau  
16 has made some findings that the NFL has  
17 submitted, prima facie evidence, and satisfied  
18 its burden of going forward with regard to  
19 those issues. Those are the other findings to  
20 which I referred.

21 Those obviously aren't definitive  
22 findings for purposes of the outcome of this



1 proceeding. The Media Bureau has identified  
2 a number of those issues as to where there are  
3 specific disputes. But the delegation to Your  
4 Honor that I read in the hearing designation  
5 order is limited to those issues as to whether  
6 the Media Bureau found that there were  
7 disputed issues of fact with regard to the  
8 substantive merits of the claims, and not to  
9 other issues including the threshold  
10 procedural issues that are addressed in the  
11 early part of the decision.

12 And I haven't gone back through, I  
13 don't really focus on the other parts of the  
14 hearing designation order dealing with the  
15 other proceedings, but I assume the other  
16 disputes - the other parties - but I assume  
17 that there are parallel provisions there as  
18 well, Your Honor.

19 MR. MILLS: Your Honor, this is  
20 David Mills for Cox. This is re-arguing  
21 something that was already decided by Judge  
22 Steinberg previously in this. This is the